IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 54 OF 2003.

1. Kushali Anant Satarkar,
son of Anant Satarkar,
major in age.

2. Ramakant Bhagwant Satarkar,
son of Bhagwant Satarkar,
major in age.

3. Gurudas Bhagwant Satarkar,
son of Bhagwant Satarkar,
major in age.

4. Eknath Hiru Satarkar,
son of Hiru Satarkar,
major in age.
All residents of House No. 78,
Muddi, Cansaulim, Goa. ..... Petitioners

VERSUS

S T A T E
(Officer I/C Vasco Police Station)
through Public Prosecutor. ..... Respondent.

Shri S. G. Dessai, Senior Advocate with Shri Shivan Dessai, Advocate for the Petitioners.

Ms. W. Coutinho, Additional Public Prosecutor for the State/Respondent.

Coram: N. A. BRITTO, J.

Date of Reserving the Judgment: 23.12.2004
Date of Pronouncing the Judgment: 13.01.2005

JUDGMENT:

In this revision application the accused in C.C. No.253/S/85

(Accused No.4 has since died) question the correctness of their conviction and sentence, by the learned J.M.F.C., Vasco-da-Gama by his Judgment/Order dated 4.2.1997, as affirmed by the learned Assistant Sessions Judge, Margao, by his Judgment/Order dated 30.8.03, under Sections 341, 326 r/w Section 34 I.P.C. and Section 30 of the Arms Act, 1959.

2. The case of the prosecution, briefly stated, was that on 20.10.1985 at about 00.15 hrs. at Muddi, Cansaulim the said accused in furtherance of their common intention wrongfully restrained the complainant-P.W.1 Jagdeep and his brother P.W.3 Jagdish by putting branches of trees on the rear side of their car and thereafter A.1 Kushali fired shot on the right leg of P.W.3 Jagdish with his 12 bore gun, causing grievous injuries to him.

In support of the case of the prosecution, the prosecution had examined 20 witnesses.

3. On the other hand, the case of the accused was that he did not know the said P.W.3 Jagdish and that at about 12.30 to 12.45 a.m. a car came to their house and on hearing the sound of the car they got up and came out. At that time A.3 Gurudas went to question the occupants of the said car, when the said car was brought on their persons, as a result of which the chappal of Gurudas remained below one of the tyres and he had to jump away from the car and then they shouted for help. It was further the case of the accused that about a month prior to this incident somebody had put gelatine to their house and as such they were afraid and thought that the persons who had put the gelatine

might have come back and they decided to detain the said car with its occupants and to bring the police for necessary action and therefore they started putting branches of the tree to obstruct the said car when one of the occupants of the car got down and came running on them and they ran away. It was further the case of the accused that the said persons removed the branches and again sat in the car and again they put the branches, but one of the occupants of the car came again and particularly towards A.1 Kushali and as he got frightened, he fired his gun on the ground near that person and as the said person came forward, the pellet hit on his foot and thereafter A.2 Ramakant was sent to the Police Station.

4. Both the Courts below have particularly relied on the evidence of P.W.1 Jagdeep who had filed the F.I.R., P.W.3 Jagdish, the injured in the incident and P.W.19 Sumitra, the wife of the said Jagdeep. Both the Courts below have also discarded the evidence of P.W.7 Lavu Naik and P.W.8 Agnelo who were the neighbours of the accused and, who, as rightly pointed out by the learned Trial Magistrate, were the persons who reached the scene later and exaggerated the case with a view to help the accused who were their neighbours. No reasons have been pointed out, different from those mentioned by the learned Trial Magistrate why the evidence of the said two witnesses namely P.W.7 Lavu and P.W.8 Agnelo should be accepted. In my view both the Courts below rightly placed reliance on the evidence of the said P.W.1 Jagdeep, P.W.3 Jagdish and P.W.19 Sumitra who were occupants of the said car and also rightly discarded the evidence of P.W.7 Lavu and P.W.8 Agnelo. As can be seen from the evidence of the injured P.W.3 Jagdish, they were returning on that night from

Majorda Beach Resort via Cansaulim in the car driven by him and while P.W.1 Jagdeep was sitting in the front, P.W.19 Sumitra was sitting at the back. He had stated that on heir way back home they missed the road and as such with a view to turn, they went to a place where there was light on the left side of the road at a distance of about two metres and the next thing they saw was that some people blocking their way by putting branches of trees. He identified all the four accused as the said persons. P.W.3 Jagdish stated that his brother came out and started removing the branches so that they could take the vehicle in reverse in order to go back, but the same persons put more branches and did not allow them to go and at that time he got down to remove the said branches and as P.W.1 Jagdeep was removing the branches he had questioned all the accused as to why they were blocking their way and they gave no answer and he along with his brother again attempted to remove the branches when A.1 Khushali came with a gun close to him and shot at his right foot as a result of which he received injury on his right foot and which injury started bleeding profusely. He also stated that prior to A.1 Khushali shotting at him, all the other accused were saying ' taka mar, taka mar ' (which could also be translated as ' hit him, hit him'). He further stated that his brother Jagdeep helped him to sit in the car and at which point of time P.W.1 Jagdish noticed a car which was coming from Majorda direction proceeding to Vasco-da-Gama and which was about to stop and the accused threatened the inmates of the car with stones and with fear of the accused, the said car went away. He further stated that his brother with the help of his sister-0in-law put him in the car and brought him to Chowgule Hospital where he was operated and thereafter he was taken to Breach Candy Hospital, Mumbai where he was again operated and treated for

about a month.

5. Shri S.G. Dessai, the learned senior counsel of the said accused, has submitted that P.W.3 Jagdish and two others were intruders in the property in possession of the accused and therefore in terms of S.43 of the Code of Criminal Procedure, 1973 the accused had every right to detain the injured along with the other two persons with a view to hand over to the Police. Shri Dessai has further submitted that the accused had tried to block the moving away of he said car twice by putting branches of trees and if at all, A.1 Kushali had fired with his gun, the same was done with a view to scare the said persons and the said gun was fired on the ground and not on the foot of P.W.3 Jagdish, which hit him, at the time when he put the said foot forward. Shri Dessai has also submitted that the act of shooting on the part of A.1 Kushali was an individual act and the remaining accused could not be connected to the same with the aid of S.34 I.P.C. Shri Dessai points out that the words :- 'taka mar, taka mar ' were conspicuously absent in the F.I.R. Lodged by P.W.1 Jagdeep.

6. On the other hand, Ms. Coutinho, the learned Addl. P.P. submits that this is a revision petition and there is no scope for re-appreciation of evidence which has been rightly appreciated by both the courts below and the accused have been rightly convicted and sentenced. The learned Addl. P.P. Ms. Coutinho further submits that the accused have not denied their presence and if at all it was the intention of the accused to scare away the said P.W.3 Jagdish, his brother and sister-in-law, then A.1 Kushali could have fired in the air and not at the foot of P.W.3 Jagdish. Ms. Coutinho has submitted that the evidence

on record shows that the accused were the aggressors and therefore they are not entitled to any right of private defence particularly because P.W.3 Jagdish and two others were unarmed and were trying to move away from the scene and were held back by the accused by putting branches of trees.

7. Ms. Coutinho has placed reliance on the cases of **Suresh and another v. State of U.P. [(2001) 3 S.C.C. 673]** and **Surjit Singh v. Nahara Ram and another (2004 AIR SCW 4550)**.

8. First of all I must observe that the scope of revisional jurisdiction is quite limited and this Court will generally not interfere unless findings of fact recorded by both the Courts below are based by omitting essential parts of evidence or are based on inadmissible or extraneous evidence.

9. Section 43 of the Code of Criminal Procedure, 1973 deals with arrest by private persons and procedure to be followed on such arrest being made. Sub-section (1) thereof provides that any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station. Admittedly P.W.3 Jagdish, who was driving the said car had entered the open space, though in front of the accused of the accused, with a view to reverse the car as they had missed the direction in which they were going. It is not at all unusual for such

persons to make use of open spaces by the side of the road with a view to reverse their vehicles. Even assuming that P.W.3 Jagdish had committed an offence of simple criminal trespass under S.447 I.P.C., it did not warrant the accused to stop their vehicle from moving forward in the direction they wanted to go not only once but twice. The right to arrest by private persons is given to persons when offences are non-bailable and cognizable, are committed in their presence. In the case at hand P.W.3 Jagdish and others had committed no such offence and therefore the accused could not get the benefit of S.43 of the Criminal Procedure Code.

10. I am also not inclined to accept the submission that the shooting is an individual act of the accused No.1 or that the remaining accused could not have been convicted with the aid of S.34 I.P.C. Section 34 I.P.C. Recognizes the principle of vacarious liability in criminal jurisprudence. It makes a person liable for action for an offence not committed by him but by another person with whom he shares the common intention. It is a rule of evidence. A common intention presupposes prior concert which requires pre-arranged plan of the accused participating in an offence. Such pre-concert or preplan may develop on the spot or during the course of commission of the offence, but the crucial test is that such plan must precede the act constituting the offence. Common intention can be formed previously or in the course of occurrence or even on the spur of the moment and the existence of common intention is the question of fact in each case to be proved mainly from inference drawn from facts proved in a given case. In other words common intention is essentially a state of mind which can be only gathered by inferences drawn from facts

unscrupulously established in a given case. Exhortation by other accused and even guarding the scene can amount to participation in furtherance of common intention. In the case at hand the case of the prosecution was that the remaining accused goaded accused No.1 Kushali by the said words to shoot at P.W.3 Jagdish and it is only then that A.1 Kushali shot at the leg of P.W.3. The nature of injuries found on the leg of P.W.3 Jagdish does not at all show that the gun was shot on the ground and the leg of P.W.3 was hit by deflected pellets. No cross-examination was done by the accused of the Doctors who examined and treated P.W.3 to get such a favourable opinion. Both P.W.1 Jagdeep as well as P.W.3 Jagdish have stated in their evidence about the said instigation by accused Nos. 2, 3 and 4 to accused No.1 and not only that, they also reiterated having stated so when their complaint/statements were recorded by the police. The defence did not put any such omission to them nor attempt to prove the same through the evidence of the police officers who recorded the said complaint or statement and being so, it could not be said that P.W.1 Jagdeep and P.W.3 Jagdish had improved their story as far as the said exhortation having been given by the accused No.2, 3 and 4 to accused No.1. Facts proved show that even after the incident of shooting, the car of P.W.4 Suvarn was banged from behind and its inmates threatened by some of the accused with stones. In my view both the Courts below have rightly convicted all the accused under Sections 341, 326 r/w S.34 I.P.C. In the case at hand the evidence of the said three witnesses clearly shows that it is the accused who were the aggressors and therefore such aggressors cannot have right of private defence either of their person or property.

11. However the same could not be said as far as the conviction under S.30 of the Arms Act, 1959, is concerned. S.30 of the Arms Act deals with punishment for contravention of a licence or rule and provides that whoever contravenes any condition of a licence or any provision of this Act or any rule made thereunder, for which no punishment is provided elsewhere in this Act, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both. It was not the case of the prosecution that A.1 Kushali did not possess a licence for the use of the said gun. It was the case of the prosecution that the gun was used in contravention of the said licence. However, the fact remains that the prosecution did not produce the said licence nor state specifically as to which condition of the licence the said accused No.1 Kushali had breached. In fact there was no whisper whatsoever regarding the breach of any of the conditions of the licence in the evidence of the police officers, particularly P.W.20 P.I. Shri Tari and in such a situation it was preposterous on the part of the learned J.M.F.C. or on the part of the learned Asst. Sessions Judge, to have convicted or maintained such conviction, respectively, under S.30 of the Arms Act, 1959. Consequently also the order of confiscation of the said gun in terms of para 23(c) and (e) by Judgment/Order of the learned J.M.F.C. also deserves to be set aside. In my view the said conviction under S.30 of the Arms Act, 1959, and the confiscation of the said gun belonging to the accused No.1 Kushali deserves to be and is hereby set aside.

12. On behalf of the accused it has also been submitted that the sentence imposed upon the accused is harsh and disproportionate to the crime committed by the accused. This submission is not without merit. There is no doubt that the accused committed a serious offence but both the Courts below were also required to see the circumstances under which the said offence/s were committed by the accused. It was nobody's case that any of the accused had any animus against P.W.1 Jagdeep and his brother. The incident had also occurred on the spur of the moment. No doubt all the accused had over reacted to an incident which had taken place at their house, almost a month earlier in which their house was damaged by gelatine, but the same certainly did not entitle the accused to think that everyone who came nearabout their house was the person responsible for the placing of the said gelatine or had returned again to put the same. The incident had taken place closer to the main tarred road than the house of the accused which was at a distance of about 25 metres or so from the said main road. Any sentence to be imposed has got to be adequate to the crime committed by the accused. At the same time there has got to be an element of proportionality in any sentence to be imposed on the accused. Considering the facts and circumstances of this case there is scope for reduction of the said sentence. In my view therefore the ends of justice would be met by upholding the sentence imposed against the accused under S.341 r/w 34 I.P.C., and by modifying the sentence under S.326 r/w 34 I.P.C. In other words, the accused shall undergo R.I. for a period of twenty days each and pay a fine of Rs.5000/- each and in default shall undergo simple imprisonment of three months. In case the fine is realised from the said three accused, the entire amount shall be paid to P.W.3 Jagdish by way of

compensation. Needless to say, the period of imprisonment undergone by the accused from 20.10.85 to 24.10.85 shall stand set off in terms of Section 428 of Cr.P.C. In other words, the sentence imposed by the learned J.M.F.C. in terms of para 23(a) is maintained. The sentence imposed under para 23(b) is modified. The sentence in terms of para 23(c) and (e) is set aside. The accused to surrender before the learned J.M.F.C. to undergo the said sentences within a period of fifteen days.

N. A. BRITTO, J.

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